(22)

IN THE

# Supreme Court of the United States



OCTOBER TERM, 1943.

FILE NO. 1008-1009

**File No. 8262.**

IN THE MATTER OF
SOUTH STATE STREET BUILDING CORPORATION, A CORPORATION,
DEBTOR.

REKA GOLDBERG HOFHEIMER,
*Petitioner,*

*vs.*

BEN GOLD, ETC., ET AL.,
*Respondents.*

**File No. 8263.**

REKA GOLDBERG HOFHEIMER,
*Petitioner,*

*vs.*

DAVID McINTEE, ETC., ET AL.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

## PETITION OF REKA GOLDBERG HOFHEIMER FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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*To the Honorable, the Supreme Court of the United States:*

## SUMMARY STATEMENT OF MATTER INVOLVED.

Your petitioner, Reka Goldberg Hofheimer, praying for a Writ of Certiorari to review a decision of The United States Circuit Court Of Appeals For The Seventh Circuit

in two causes (File Nos. 8262-3) which were consolidated in that court, on appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division, respectfully says:

**The Bankruptcy Appeal.**

Cause No. 8262 is a bankruptcy proceeding for the reorganization of a Debtor under Chapter X of the Bankruptcy Act of 1938 (R. 2). Petitioner filed, with leave of the Bankruptcy Court, her objections to the modified plan of reorganization (R. 54). The Bankruptcy Court overruled petitioner's objections to the confirmation of the plan (R. 74) and entered an order confirming the plan (R. 82). Petitioner gave notice of appeal from this order (R. 96).

Although petitioner was permitted to file her verified objections (R. 88) and to be heard in argument in the bankruptcy court, *the merits* of her objections *were not considered* and *no trial on the merits was had* in the Bankruptcy Court. Her objections were overruled, and, at a later hearing, the trial court held that petitioner had "no place" in the bankruptcy proceedings (R. 89-96).

As set forth in her verified objections, petitioner showed that the plan of reorganization as confirmed by the bankruptcy court involved the payment of more than $1,260,000 from the corporate treasury of The Hump Hair Pin Manufacturing Company, a holding company (hereinafter called "the Hump Company"), *without any consideration to the corporation* (R. 60-64). Her sworn objections disclosed that The Hump Company (and its subsidiaries) were paying more than $1,260,000 to a new corporation to be organized in the reorganization proceedings solely because the principal and majority stockholder of The Hump Company (Sol H. Goldberg, now deceased, who was petitioner's brother) was the *personal* individual guarantor of $853,000 par value of the Debtor's outstanding first mortgage leasehold bonds (R. 60-64). These bonds were inadequately

secured, thus rendering the Debtor insolvent (R. 60-64). Petitioner further showed that she was the owner of 1/3 of all the preferred and common stock of The Hump Company, of which 20 shares of preferred stock and 50 of common stock were presently issued of record and outstanding in her name (R. 56-59).

Or, to put the matter even more succinctly, petitioner objected that the plan of reorganization, if confirmed and consummated, would defraud her of her 1/3 minority stockholder's rights in The Hump Company, to the extent of $420,000 (one-third of the $1,260,000) which the Hump Company under the plan proposed to pay to others *without receiving any adequate consideration in return*, and *solely to "bail out"* the *majority stockholder's individual obligation as guarantor of the Debtor's $853,000 bond issue*, a debt with which neither The Hump Company nor petitioner had any connection whatever (R. 60-64).

The Circuit Court of Appeals for the Seventh Circuit summarily dismissed petitioner's appeal from the order confirming the plan upon the ground that it had *no jurisdiction of the controversy* because petitioner was neither (1) the Debtor, (2) the indenture trustee, nor (3) a creditor or stockholder of the Debtor, these being the only parties in interest having an *absolute* right of intervention and appeal under Section 206 of Chapter X of the Bankruptcy Act (11 U. S. C. A., Sec. 606); and that petitioner had no *permissive* right to intervene and be heard or to appeal in the reorganization proceedings under Section 207 of Chapter X of the Bankruptcy Act (11 U. S. C. A., Sec. 607) or under Federal Rule of Civil Procedure 24 (28 U. S. C. A. foll. § 723c) because these provisions did not enlarge the category of interested persons who were entitled to come into the Bankruptcy Court to be heard as they were defined in Section 206 (R. 181-8).

In other words, the Circuit Court of Appeals held that

no person, even though he be a party in interest, has any *permissive* right of intervention under Section 207 and Rule 24 *unless he be specifically described* as having an *absolute* right to intervene and be heard under Section 206; and the Circuit Court summarily dismissed petitioner's appeal upon this ground *without requiring a trial in the bankruptcy court* and *without considering the appeal upon its merits* (R. 185-8).

Thus petitioner effectively and summarily was deprived in *both* the bankruptcy court and The Seventh Circuit Court Of Appeals of *any right to be heard upon the merits* of her sworn objections to the plan of reorganization which, if consummated, will deprive her of her property to the extent of 1/3 of $1,260,000 (or $420,000).

**The Equity Appeal.**

Consolidated with the foregoing appeal (File No. 8262) by order of the Seventh Circuit Of Appeals was an appeal (File No. 8263) from an order denying petitioner's motion for a preliminary injunction in an equity action commenced by her in the same District Court of the United States for the Northern District of Illinois, Eastern Division, in which she sought to protect the same rights of which she was deprived in the Bankruptcy Court (R. 146). This appeal was taken as of right under Section 129 of the Judicial Code. Here again she was denied any relief, this time on the ground that she had stated no cause of action for fraud even though *she charged under oath* that *The Hump Company*, in which she owned 1/3 of all the stock, *was "paying the debt of another"* (her deceased brother) to the tune of $1,260,000, *without receiving any adequate consideration in return.*

The Fifth and Fourteenth Amendments to the Federal Constitution provides that no person shall be deprived

'of * * * property, without due process of law." The Circuit Court of Appeals found, *as though these issues had been actually litigated and heard on their merits in the Federal Bankruptcy and Equity Courts below* (though in fact *no* hearing *on the merits* had been had):

1. The Debtor had "a substantial claim" against The Hump Company for $830,000, the settlement of which was adequate consideration for the $1,260,000 which The Hump Company and its subsidiaries agreed under the plan to pay the Debtor (or its successor to be organized to take the Debtor's place) (R. 184).

*There was no hearing or proof on this issue.* On the contrary, the record shows that petitioner swore to the facts (in her verified objections to the plan), showing conclusively that the "claim" of $830,000 was based upon a claim for "future rent" against another bankrupt company (McCrory Stores Corporation) which was *absolutely void* under *Manhattan Properties, Inc.* v. *Irving Trust Company, Trustee*, 291 U. S. 320, 78 L. Ed. 825 (R. 61-3, 79).

2. The Hump Company and its subsidiaries would receive "other consideration of large proportions" consisting of "new stock of the Debtor and an assignment of Sol Goldberg's guarantee of the old bonds" (R. 184).

*There was no hearing or proof on this issue.* On the contrary, the record shows that petitioner swore to the facts (in her verified objections to the plan) showing conclusively (1) that the "new stock" was of less-than-no-value until the $1,260,000 of The Hump Company's money had been used to pay off the $853,000 debt, and interest, *personally* guaranteed by Sol Goldberg; and (2) that the Estate of Sol Goldberg was, or would be, "utterly insolvent and unable to pay all or any substantial part of said sum of $853,000, by reason whereof the assignment of said claim based upon such guaranty is totally inadequate considera-

tion" for the loss to The Hump Company of $1,260,000 (R. 61-63).

3. There were no other facts alleged in petitioner's sworn objections to the plan showing fraud, *ultra vires* acts, irreparable injury, or gross mismanagement by the officers and directors of The Hump Company, and that petitioner's sworn complaint "simply finds fault with the business judgment of the officers and directors of Hump" (R. 184-5).

On the contrary, if the facts alleged in petitioner's sworn objections and sworn complaint were true (and they were *absolutely uncontroverted by any contrary* affidavits or other *proof*) the officers and directors of The Hump Company must indisputably have been guilty of fraud, *ultra vires* acts, and gross mismanagement of The Hump Company and its subsidiaries (R. 60-5).

The finding of the foregoing facts and conclusions of fact by the Seventh Circuit Court Of Appeals, *without any evidence or any hearing or trial on the merits* in the Federal Bankruptcy and Equity Courts below, and in the face of exactly contrary sworn statements of fact contained in the verified objections in the bankruptcy proceedings and in the complaint in equity, filed by petitioner, clearly constitutes, petitioner submits, a violation of the Federal Constitution by depriving petition of $420,000 of her property "without due process of law."

## STATEMENT OF BASIS OF THIS COURT'S JURISDICTION.

The decision of the Circuit Court of Appeals For The Seventh Circuit in this case that petitioner, because she has no *absolute* right to intervene under Section 206 of Chapter X of the Bankruptcy Act therefore can have no *permissive* right of intervention under Section 207 of Chapter X of the Bankruptcy Act and under Federal Rule Of Civil Procedure 24, *directly conflicts, upon a question of Federal law*, with the explicit provisions of both Section 207 and Rule 24, as well as with all of the decisions both of this Court and of all the other Circuit Courts of Appeals upon the same question.

## THE QUESTIONS PRESENTED.

There are three questions presented:

1. Is petitioner, who will be deprived of $420,000 of her property by the order of confirmation of a plan of reorganization in the Bankruptcy Court, to be denied her *permissive* right of intervention which is explicitly granted to her under Section 207 of Chapter X of the Bankruptcy Act and under Federal Rule Of Civil Procedure 24, *merely because she is not one of those parties who* is *specifically described as entitled to an absolute right of intervention under Section 206 of Chapter X of the Bankruptcy Act?*

2. Does petitioner have a *right of appeal* from an order of confirmation of a plan of reorganization which will deprive her of $420,000 of her property, if she has participated in the proceedings in the Bankruptcy Court and is entitled to a *permissive* right of intervention therein, even though no *formal* order of intervention has been entered therein?

3. Has petitioner been deprived of $420,000 of her property "without due process of law" under the Fourteenth Amendment by the decision of the Circuit Court Of Appeals For The Seventh Circuit affirming decrees in the Federal Bankruptcy and Equity Courts below, *when each of these decisions determines the facts upon which it is based adversely to petitioner's sworn pleadings and in the total absence of any hearing or trial of the facts on the merits of petitioner's case?*

## REASONS FOR THE ALLOWANCE OF THE WRIT.

Until the decision in this case, Section 207 of Chapter X of the Bankruptcy Act and Federal Rule Of Civil Procedure 24 invariably have been held to grant a *permissive* right of intervention in bankruptcy proceedings to parties in interest such as petitioner, *in addition to* those who are specifically described in Section 206 as entitled to an *absolute* right of intervention therein. It therefore amply appears that the decision of the Circuit Court Of Appeals For The Seventh Circuit is *directly in conflict upon a question of Federal law*, not only with the clear and explicit provisions of Section 207 of Chapter X of the Bankruptcy Act and Federal Rule of Civil Procedure 24, but also with the decisions of this Court and of all the other Circuit Courts of Appeals upon the same question. (See Argument below.)

Each of the three questions involved is important. Firstly, if Section 207 of Chapter X of the Bankruptcy Act and Federal Rule Of Civil Procedure 24 are, in effect, to be "wiped off the statute books" by judicial decree, it should only be by a considered decision of this Court.

This Court has held (*Stoll* v. *Gottlieb*, 305 U. S. 165 (1938), 83 L. Ed. 104) that under Chapter X of the Bankruptcy Act, the Bankruptcy Court in reorganization proceedings has both the right and the duty to consider and adjudicate the rights of third parties who have an actual and material financial interest in the reorganization and which are affected thereby. Indeed, in the *Stoll* case this Court has held that a decree in bankruptcy such as a decree confirming a plan of reorganization which deprives a third party of his rights, even though those rights be

not actually litigated in the Bankruptcy Court, may nevertheless be *res judicata* of such rights in a later action elsewhere. Clearly (1) to place petitioner, or any other objector to a plan of reorganization whose interests are adversely affected thereby, in the position of being denied her *permissive* right of intervention under Section 207 of Chapter X of the Bankruptcy Act and Federal Rule Of Civil Procedure 24, and (2) at the same time to subject the same person to the risk that her failure to intervene may be *res judicata* of her rights in so far as they are adversely affected by the plan of reorganization, is to deprive such party of her rights "without due process of law."

As to the second question, namely, whether a party in interest who is deprived of $420,000 of her property without consideration and in fraud of her rights by a plan of reorganization after she has filed sworn objections to the plan in the Bankruptcy Court and orally argued the same shall be granted a right of appeal, it has invariably been held by this Court and by the Circuit Courts Of Appeals (with the exception of the decision in this case) that such a party has a right of appeal under the Bankruptcy Act.

Thirdly and finally, is the grave question arising from the mode of procedure followed by the Federal Bankruptcy and Equity Courts and also by the Seventh Circuit Court Of Appeals under which the findings of fact necessary to and upon which the Circuit Court's opinion and decision are based (which findings are stated in such opinion as though such facts had been proved by evidence at a trial upon the merits), were never actually proved or sustained either by verified affidavits or by evidence, as no trial or hearing upon the merits of the controversy ever was had. This mode of procedure clearly and indisputably violates the "due process clause" of the Federal Constitution, which provides that no man shall be condemned in his

property without an opportunity of being heard in his defense.

WHEREFORE, petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court Of Appeals For The Seventh Circuit commanding said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and of the proceedings of said Circuit Court Of Appeals had in this case, to the end that this cause may be reviewed and determined by this honorable Court as provided by the Statutes of the United States; that each of said final orders of said Circuit Court Of Appeals be reversed or altered by this honorable Court; and petitioner also prays for such other, further or different relief as may seem proper.

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